Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.199 of 2010

Dated 4th August, 2011

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Maharashtra State Power Generation Co. Ltd.,
A company incorporated under the
Companies Act, 1956 and having
its registered Office at Plot No. G-9,
Prakashgad, Bandra (East),
Mumbai-400 051. **... Appellant(s)**

Versus

1. **Maharashtra Electricity Regulatory Commission,**
   a Commission constituted under the provisions
   of Electricity (Supply) Act, 1998 and having its office at
   13th Floor, Center No. 1,
   World Trade Centre, Cuffe Parade,
   Colaba, Mumbai-400 005.

2. **Dr. Ashok Pendse,**
   Mumbai Grahak Panchayat,
   Grahak Bhavan, Sant Dyaneshwar Marg,
   Behind Cooper Hospital,
   Vile Parle (W),
   Mumbai- 400 056.

3. **Thane Belapur Industrial Association,**
   Plot – P14, MIDC, Rabale Village,
   P.O. Ghasoli,
   Navi Mumbai-400 701.

4. The President,
Vidarbha Industrial Association,
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur-440 001.

5. Prayas (Energy Group),
Amrita Clinic, Athwale Corner,
Deccan Gymkhana, Karve Road,
Pune-411 001.

6. Shri Shrikant Dudhane,
Chairman,
Kolhapur Engineer Association,
1243/46, 47, E-Ward,
Shivajiudyam Nagar,
Kolhapur-416 008.

7. Shri B.T. Tendulkar,
Vice-Chairman,
Kolhapur Engineer Association,
1243/46, 47, E-Ward,
Shivajiudyam Nagar,
Kolhapur-416 008.

8. Shri Balachandran
General Manager (Power & Energy),
ISPAT Industries Ltd.,
"Nirmal" 7th Floor, Nariman Point,
Mumbai-400 021

9. Shri N. Poorathnam,
Vel Induction Hardenings,
25, Majithia Industrial Estate,
WTP Marg, Deonar,
Mumbai-400 088.

10. Shri Bhasker U. Mete,
Working President,
Graduate Engineers Association,
Quarter No. IV/08/04,
Koradi TPS Colony, Koradi,
Nagpur-441 111.

11. Maharashtra State Electricity Distribution Co. Ltd.,
Plot No. G-9, Prakashgad,
Bandra (East), Mumbai-400 051 ...Respondent(s)

Counsel for the Appellant(s): Mr. Sanjay Sen
Ms. Deepa Chawan, Mr. Kiran Gandhi,
Ms. Amita Rajora &
Ms. Taruna A. Prasad

Counsel for the Respondent(s):Mr. Buddy A. Ranganadhan for R-1

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by Maharashtra State Power Generation Company Ltd. challenging the order dated 12.9.2010 of the Maharashtra Electricity Regulatory Commission for true up of financials of the appellant for FY 2008-09, Annual Performance Review (APR) for FY 2009-10 and Annual Revenue Requirement (ARR) and tariff for FY 2010-11.

The appellant herein is a generating company formed after the restructuring of Maharashtra State

Electricity Board during the FY 2005-06. The respondent no. 1 is the State Commission. The respondent nos. 2 to 10 are the representatives of the consumer associations/NGOs and the consumers of the state distribution company. The respondent no. 11 is the distribution company which purchases the entire power output of the appellant's generating stations.

2. The brief facts of the case are as under:

2.1. On 31.12.2009, the appellant filed a petition before the State Commission for true up of FY 2008-09, APR for the FY 2009-10 and ARR and tariff determination for FY 2010-11.

2.2. The State Commission after the public hearing passed the impugned order dated 12.9.2010 whereby certain costs claimed by the appellant were not

allowed. Aggrieved by the said order, the appellant has filed this appeal.

3. The appellant had initially raised the following issues in the appeal.

I. Truing up for FY 2008-09:

(A) Cost of fuel incorrectly computed

(B) Disallowance of O&M expenses

(C) Disapproval of capital expenses for FY 2008-09

(D) Disallowance of depreciation and AAD in FY 2008-09

(E) Erroneous disapproval of interest expenses and finance charges in FY 2008-09

(F) Erroneous disapproval of interest on working capital

(G) Reduction in annual fixed charges on account of reduction in availability

(H) Erroneous revenue side truing up

II. APR FY 2009-10 and Tariff for FY 2010-11

(I) Non-consideration of technical performance of parameters for 2009-10 and 2010-11

(J) Error in computation of other variable charges for FY 2010-11

(K) Computational issue in relation to fuel cost for FY 2010-11

(L) Erroneous approval of O&M expenses for FY 2009-10 and 2010-11

(M) Erroneous computation of prior period items

(N) Improper disallowance of capital expenditure and capitalization

(O) Error in computing income tax.

4. However, during the proceedings of the appeal, the learned counsel for the appellant filed a record of proceedings of a meeting dated 21.1.2011 between the

State Commission and the appellant wherein the State Commission had agreed that some errors had crept in the tariff order which were apparent on the face of records. This Tribunal after hearing the learned counsel for the parties and in view of the submission that in the event of the errors not being rectified before the end of the FY 2011 the appellant would face difficulties, passed an order on 28.2.2011 allowing the IA and giving liberty to the State Commission to go through the exercise of correction of error as mentioned in the Record of Proceedings. Consequently, some of the issues raised in the appeal would not survive.

5. On the remaining issues, Ms. Deepa Chawan, learned counsel for the appellant made the following

submissions:

5.1. Cost of fuel trued up for FY 2008-09 and computation of fuel cost for FY-2010-11:

The State Commission has considered the Station Heat Rate as recommended by the Central Power Research Institute (CPRI) appointed by the State Commission after carrying out the studies at the various power plants of the appellant. While the State Commission disallowed the normative fuel cost as per the recommendations of CPRI for the years 2005-06 to 2007-08 and restricted the fuel cost to the actuals, from the year 2008-09 onwards the norms as recommended by the CPRI have been followed. Thus, the approach of the State Commission has not been consistent. For 2008-09 to 2010-11 also the actual fuel cost should have been allowed or else the norms as recommended by the CPRI should have been used

for the period from FY 2005-06 to FY 2007-08. Further, while denying the fuel cost considering Station Heat Rate as per CPRI study, the State Commission reduced the consumption of various coals viz. domestic, washed and imported in the same proportion. Any disallowance has to be necessarily done in the domestic coal only. In support of her contention on this issue, the learned counsel gave detailed reasoning that (i) usage of imported coal is forced on the appellant due to shortage of domestic coal; (ii) high cost of imported coal itself is a burden on the appellant; (iii) the State Commission has deviated from the past practice.

5.2. Disallowance of O&M expenses in true up of FY 2008-09 and ARR for FY 2010-11:

The State Commission has not taken into cognizance of the several factors which have led to an increase in

O&M expenses from FY 2008-09 onwards. Some of the reasons for increase in O&M expenses are impact of pay revision which would be applicable to the appellant's employees retrospectively from 1.4.2008 amounting to Rs. 96 crores and accordingly provided for in the audited accounts for FY 2008-09, liability of Rs. 28.04 crores based on actuarial report for post-employment benefit, additional provision for gratuity for Rs. 8.08 crores, bonus of Rs. 9.75 Crores for employees, lease rent of buildings owned by MSEB Holding Company for Rs. 8.91 crores, water royalty and civil O&M charges claimed by Water Resources Department, Govt. of Maharashtra resulting in a liability Rs. 40 crores/annum, etc. It may not be possible to restrict Repair & Maintenance expenses within the escalation factor, as R&M expenses are dependent on the age of the units. According to Tariff

Regulation 12.2, the State Commission should have considered the factors which were beyond the control of the appellant.

5.3. Capital expenses for FY 2008-09 and for FY 2010-11:

The State Commission has restricted capitalization for non-DPR schemes equivalent to 50% of the capitalization proposed by the appellant. The State Commission by its APR order for 2008-09 dated 17/18.8.2009 had directed the appellant to bundle the non-DPR schemes into DPR schemes and submit before the State Commission for approval. By the time of the APR order for FY 2008-09, not only the period 2008-09 but almost first half of 2009-10 had already elapsed. Therefore, the State Commission instead of reducing the non-DPR schemes to 50% on ad-hoc

basis should have prudently examined the expenditure.

5.4. Advance Against Depreciation for FY 2008-09:

The State Commission has wrongly disallowed Advance Against Depreciation (AAD) for individual stations. The State Commission incorrectly considered AAD for company as a whole, contrary to the provisions of the Regulation.

5.5. Interest expenses and finance charges for FY 2008-09:

The State Commission has disallowed part of interest expenses on such amount of loan which exceeded the capitalization during the year in case of Parli and Nasik stations. For other stations where the loan drawal was less than the capitalization, the State Commission has considered the normative loan. This is not the correct practice as loan drawal and

capitalization may not be equal in real terms as part of loan drawal may be lying under work in progress.

5.6. Non-consideration of technical performance of Parameters for FY 2009-10 and 2010-11.

The State Commission has not taken into consideration the recommendations of the CPRI Report relating to the medium and long term measures while accepting its recommendations relating to performance parameters forthwith. The appellant has submitted plans to implement the capital expenditure schemes for some power plants as per the recommendations of the CPRI to be implemented during the next couple of years to the State Commission for approval. Some of the machines may have to be shut down to implement the plans. The State Commission has approved Station Heat Rate (SHR) for 2009-10 and 2010-11 as per the recommendations of CPRI. For 2009-10 the

State Commission has considered the SHR after implementation of immediate measures. For 2010-11, the State Commission has considered the SHR after implementation of medium terms measure which are to be implemented over a time frame of 2-3 years as per CPRI. The State Commission has to consider practical time line for implementation of medium term measures before reducing the SHR.

5.7. Reduction in Annual Fixed charges on account of reduction in availability for FY 2008-09:

The State Commission has considered the normative availability as per the recommendations of CPRI and reduced the recovery of Annual Fixed Charges on pro-rata basis for the power stations where the actual availability was less than normative availability. The report of CPRI was finalized only in December, 2009 and subsequent developments with regard to

implementation of CPRI's recommendations are underway. Any penalization on account of non-achievement of normative availability may be considered post the implementation of schemes which are under the process of implementation. Further, the actual income tax of Rs. 37.53 allowed by the State Commission as a pass through and prior period true up of Rs. 48.27 crores and amortization of bad debt pertaining to FY 2005-06 of Rs. 8.37 crores should not be added to Annual Fixed Charges for the purpose of pro-rata reduction on account of lower plant availability during FY 2008-09.

5.8. Disapproval of interest on working capital in true up for FY 2008-09:

The appellant has urged that the impact of truing up of other parameters as impugned in this appeal ought

to be considered for the purpose of working out the true up amount.

6. Ms. Deepa Chavan argued extensively on the above issues assailing the impugned order of the State Commission. On the other hand, Shri Buddy A. Ranganadhan, learned counsel for the State Commission argued forcefully in support of the findings of the State Commission.

7. After considering the contentions of the parties, the following questions would arise for consideration:

i) Was the State Commission correct in denying the fuel cost considering the Station Heat Rate as per the recommendations of CPRI by reducing the consumption of various types of coal viz. domestic raw, domestic washed and

imported coal in the same proportion instead of reducing quantum of domestic coal alone?

ii) Has the State Commission erred in not considering the increase in Operation & Maintenance expenses due to factors beyond the control of the appellant in addition to the escalation allowed as per the Regulations?

iii) Was the State Commission correct in restricting the capitalization of Non-DPR schemes instead of prudently examining the expenditure?

iv) Has the State Commission wrongly disallowed Advance Against Depreciation for individual stations by considering the same for company as a whole?

v) Has the State Commission erred in disallowing the part of interest expenses on such amount of loan which exceeded the capitalization during the year?

vi) Was the State Commission correct in adopting the performance parameters according to the recommendations of the CPRI without considering the time required for implementation of the medium term measures suggested by CPRI for improvement of the performance parameters?

vii) Is the State Commission correct in reducing the Annual Fixed charges on account of reduction in availability during the FY 2008-09 without considering that the

CPRI report was finalized only in December, 2009.

viii) Is the interest on working capital in true up for FY 2008-09 required to be revised on the basis of true-up of other parameters impugned in this appeal.

8. Let us take up the first issue on cost of fuel:

8.1. The issues raised by the learned counsel for the appellant regarding fuel expenses are as under:

a) Consistency in application of normative parameters: The State Commission had earlier decided that CPRI trajectory cannot be applied in the period from FY 2005-06 to FY 2007-08 as the heat rates suggested by the CPRI for the past period was based on degradation factor which do not reflect the

heat rates which could have been achieved with the plant conditions during those years. Accordingly, the State Commission allowed the actual fuel cost for the period from FY 2005-06 to FY 2007-08. However, for 2008-09 onwards, the State Commission has adjusted the heat rates recommended by CPRI. The State Commission should have either adopted CPRI recommendations for FY 2005-06 to FY 2007-08 or allowed actual fuel cost for FY 2008-09 onwards also till medium term measures to improve heat rate are implemented at the power stations of the appellant.

b) <u>Practical Issues in implementation of Capex for improvement of operational parameters:</u> CPRI has carried out the study and

submitted the report during the years 2008-09 and 2009-10. The implementation of medium term measures for improving the performance of the power stations of the appellant is expected to take time due to gestation period including the time taken in approval of Capex by the State Commission, placement of orders and implementation at the power plant.

c) Point of implementation of CPRI Trajectory:

The likely point of start of improvement trajectory as per the State Commission is 2008-09. However, due to gestation period in implementation of the Capex, the likely point of start improvement trajectory subject to implementation of Capex should be from FY 2011-12.

d) Denial of proportionate imported coal while considering normative Station Heat Rate: The State Commission has reduced the consumption of fuel proportionately for domestic, washed and imported coal resulting in denial of fuel cost at a higher cost. The State Commission should not have considered imported coal for disallowance of fuel cost as imported coal is being used by the appellant due to short supply of domestic coal and on the direction of the Central Government. The State Commission should have restricted the disallowance, if any, in the domestic coal only, as per the past practice.

8.2. Learned counsel for the State Commission argued that it is not correct to suggest that the CPRI recommendations cannot be applied from the FY 2009-10 itself. The CPRI recommendations for improvements at the power plants do not depend on investments alone, but also apply for the improvements in management practices of the appellant.

8.3. We will now examine the issues raised by the learned counsel for the appellant regarding the fuel cost. The issue regarding allowing the fuel cost as per actuals for the past period from FY 2005-06 to FY 2007-08 has been decided by this Tribunal in its Judgment dated 27.4.2011 in appeal no. 191 of 2009 in the matter of Maharashtra State Power Generation Co. Ltd. vs. MERC & Ors. The relevant extracts of the

findings of the Tribunal are reproduced below:

> *"9.4. We find that the State Commission has given a reasoned order for not accepting the base heat rate as per the assessment of CPRI for the past period based on theoretical assumption of degradation factor and allowed the actual fuel cost. We are in agreement with the methodology used by the State Commission for true up for fuel cost for the FY 2005-06 to 2007-08 due to change in procedure made during the study in the years 2008/2009 and back computation of Station Heat Rate on theoretical basis without regard to actual site conditions. Also no loss has been caused to the Appellant by adopting the actual fuel expenses for these years. Accordingly, we confirm the State Commission's finding on this issue".*

CPRI had carried out the study at the power plants of the appellant during the years 2008 and 2009. If the State Commission has adopted the performance figures of the power plants as per the

measurements carried out by CPRI during 2008/09, for the true up of FY 2008-09, then these figures would reflect the ground reality. Thus, we do not find any fault in State Commission's approach in adopting the performance figures as per CPRI study for the true up of FY- 2008-09.

8.4. In order to understand the issue of improvement in heat rate trajectory for FY 2009-10 and 2010-11 we shall first examine the trajectory for Station Heat Rate determined by the State Commission for the FY 2008-09, 2009-10 and 2010-11. The SHR trajectory is indicated below:

S.No.	Name of Power Station	SHR for 2008-09	SHR for 2009-10	%age increase over the year 2008-09	SHR for 2010-11	%age increase over the year 2008-09
1.	Khaparkheda	2653	2612.2	1.5%	2559	3.5%
2.	Paras	3310	3223.8	2.6%	3186.5	3.7%
3.	Bhusawal	2856	2784.3	2.5%	2733.9	4.2%
4.	Nasik	2833	2774.3	2.1%	2721.9	3.9%
5.	Parli	2919	2796.1	4.2%	2744.6	6%
6.	Koradi	3043	3014.9	0.9%	2964.8	2.6%
7.	Chandrapur	2759	2664.4	3.4%	2617.0	5.1%

Thus, the State Commission has approved increase in Station Heat Rate for FY 2009-10 in the range of 0.9% to 4.2% and for FY 2010-11 in the range of 3.5% to 6% over the FY 2008-09 for different power stations. It is correct that some improvement in SHR can be achieved by improving the operation practices but the major achievement can only be attained by physically implementing the medium term measures which may involve procurement of spare parts, shut down of the unit and repair and replacement of some equipments. In our opinion, reasonable time has to be given for completion of the medium term measures required for improvement of the SHR. The improvement due to operational/management practices has been accounted for in the SHR determined for 2008-09 and 2009-10 but for further improvement a reasonable allowance for gestation period for implementation of

the medium term measures would be required to be given. It is pleaded by the appellant that some of the schemes for efficiency improvement have been under consideration of the State Commission. Accordingly, we direct the State Commission to reconsider the Station Heat Rate for FY 2010-11, taking into account the gestation period required for carrying out the medium term measures and re-determine the fuel cost for FY 2010-11.

8.5. The next issue raised by the appellant is reduction of coal consumption on account of not achieving the normative performance parameters. The State Commission has reduced the consumption of domestic raw, washed and imported coal on pro rata basis. In our opinion, there is nothing wrong in the approach of the State Commission as in this manner the disallowance is at the average cost of coal. There

is no force in the argument of the appellant that the import of coal is being resorted to due to shortage of indigenous coal. If the efficiency of the plant improves there will be saving in the use of imported coal too. Further, State Commission can deviate in the methodology for disallowance of cost of coal due to non-achievement of the operational parameters used in previous year as each year's ARR is a different exercise.

8.6. Learned counsel for the appellant also raised the issue of State Commission not providing the detailed calculations in the impugned tariff order. According to her, the appellant has been making specific prayer before the State Commission to provide the excel model used by the State Commission for the approval of costs, but the same has not been provided. The appellant is getting different results for costs

determined as per the assumptions made by the State Commission. We also feel that the order should clearly give the tabulation of determination of various costs with the formula used to have more clarity. Accordingly, the State Commission is directed to provide the details of calculation of coal cost to the appellant.

9. The second issue is regarding Operation & Maintenance expenditure.

9.1. The learned counsel for the appellant had raised some issues relating to computation of O&M expenses by the State Commission for the base year i.e. FY 2006-07. This issue has already been dealt with in this Tribunal's judgment dated 27.4.2011 in appeal no. 191 of 2009. The relevant extracts of the judgment

are as under:

> *"8.8. In view of the above, we do not find any reason to interfere with the order of the State Commission on O&M expenses. However, we give liberty to the Appellant to place the issue of gross/ net O&M expenses raised in this Appeal before the State Commission for consideration in subsequent True Up or Tariff petition and in that event the State Commission may consider the same to ensure that the Appellant is not denied of the legitimate O&M expenses on account of booking of O&M expenses to Capital Works".*

9.2. The other issues raised by the learned counsel for the appellant are:

i) Increase in establishment expenses due to pay revision which would be applicable from 1.4.2008, abnormal increase in DA, leave encashment, additional provision for gratuity

and bonus should be accounted for over and above the normative expenses.

ii) Share of the appellant for payment of lease rent of office buildings, residential buildings and guest houses to the MSEB Holding Company Limited.

iii) Levy of civil O&M charges and water Royalty charges claimed by Government of Maharashtra, the liability of which is expected to be Rs. 40 crores.

9.3. According to the learned counsel for the appellant, the State Commission did not pass a reasoned order on the above issues raised by the appellant before the State Commission.

9.4. The State Commission in the impugned order has not considered the above submissions of the

appellant as the impugned order is silent on these issues. Accordingly, the State Commission is directed to consider the submissions of the appellant on the above issues and pass a reasoned order.

10. The third issue is regarding disapproval of capital expenses.

10.1. Learned counsel for the Appellant has submitted that the State Commission allowed the capitalization to the extent of 50% of the proposed capitalization on ad-hoc basis. The principle of restricting the non-DPR scheme related Capex was first introduced by the State Commission in APR order for FY 2008-09 dated 17/18.8.2009. Accordingly, the State Commission decided that the total expenditure and capitalization on non-DPR schemes in any year should not exceed 20% of that for DPR schemes during that year and that the purported non-DPR schemes

should be packaged into larger schemes by combining similar non-DPR schemes together and converted into DPR schemes for obtaining in principle approval of the State Commission. By the time of the notification of order dated 17/18.8.2009, the period of 2008-09 and also almost first half of 2009-10 had already elapsed. The order of the State Commission can not be applied retrospectively.

10.2. According to learned counsel for the State Commission, the State Commission has exercised its powers of implementing guidelines for in principle approval of Capex scheme and such powers have been upheld in this Tribunal's Judgments dated 21.5.2007 in appeal no. 46 of 2007 titled Maharashtra State Electricity Distribution Co. Ltd. Vs. MERC and dated 23.3.2011 in appeal no. 139 of 2009 in the matter of

Maharashtra State Electricity Transmission Co. Ltd. Vs. MERC.

10.3. Let us first examine the findings of the State Commission in this regard. The relevant extracts for FY 2008-09 true up are as under:

> *"The Commission observes that MSPGCL has incurred capitalisation only towards the Non-DPR schemes. The Commission, for approving capital expenditure and capitalization for Renovation and Modernisation schemes of Generating Companies, has instituted a process of giving in-principle approval for the capital expenditure schemes costing above Rs. 10 Crore (together known as DPR Schemes), wherein the Utility has to submit Detailed Project Report (DPR) as well as the expected cost-benefit analysis, payback period, etc., as per well laid out guidelines. Schemes costing less than Rs. 10 Crore are considered as non- DPR schemes and the Utilities are not required to submit any DPR for the approval of the same. It is often observed that at the time of obtaining in-*

principle approval of the Commission for the DPR schemes, the Utilities indicate several quantifiable benefits and a short payback period. However, the Utilities are not able to substantiate the benefits once the capital investment is actually undertaken and the assets are added to the Gross Fixed Assets (GFA). As a result, the costs and hence, the tariffs are increased, but the expected benefits to the system do not accrue.

In view of the above, the Commission has decided that the total capital expenditure and capitalisation on non-DPR schemes in any year should be restricted. To achieve the purpose, the non-DPR schemes should be packaged into larger schemes by combining similar or related non-DPR schemes together and converted to DPR schemes, so that the in-principle approval of the Commission can be sought in accordance with the guidelines specified by the Commission.

Further, in the absence of documentary evidence that the stated purpose and objective of the capex

schemes have been achieved, the Commission has restricted the capitalization for Non-DPR schemes equivalent to 50% of the capitalisation proposed by MSPGCL towards Non DPR schemes"

Thus, the State Commission due to absence of documentary evidence regarding achievement of objective of Capex scheme, has restricted the capitalization of Non-DPR schemes to 50% of the capitalization proposed by the appellant, on ad-hoc basis.

10.4. The relevant extracts for FY 2010-11 are as under:

"The Commission has dealt with the issue of Capital Expenditure and Capitalisation in detail in its Order dated August 17, 2009 in Case No. 115 of 2008. As per Regulation 30.1 of the MERC Tariff Regulations, subject to prudence check by the Commission, actual capital expenditure incurred on

completion of the project shall form the basis for determination of original cost of the project. For the purpose of APR exercise for FY 2009-10 and revised projection for FY 2010-11, the Commission has considered capitalisation as projected by MSPGCL for DPR schemes already approved by the Commission. However, the Commission has not considered any capitalisation of such DPR schemes where in-principle approval of the Commission is yet to be accorded.

For Non-DPR schemes, the Commission has considered 50% of the proposed capitalisation by MSPGCL on ad-hoc basis, as very few DPR schemes have been submitted by MSPGCL and approved by the Commission, and any linkage of non-DPR schemes as a percentage of approved DPR schemes may not be appropriate at this stage. Further, the Commission is of the view that until it is ascertained that the projected benefits have actually accrued for the benefit of the consumers, it would not be appropriate to allow the entire expenses.

Thus, the State Commission has considered the DPR Schemes already approved and restricted the non-DPR schemes on ad-hoc basis to 50% of proposed capitalization.

10.5. The State Commission has to carry out prudence check of expenditure before approving the capitalization. The State Commission vide its order dated 17/18.8.2009 has directed the appellant to club the similar Non-DPR schemes and convert into large DPR schemes for approval of the State Commission. However, there is a substance in the argument of Ms. Deepa Chavan that the directions were given when part of FY 2009-10 was already over. We are of the opinion that these directions can not be applied retrospectively. Therefore, instead of restricting the expenditure on non-DPR schemes for FY 2008-09 and

2009-10 to 50% on ad-hoc basis, the State Commission should allow expenditure on non-DPR schemes for the FY 2008-09 and 2009-10 after prudence check. We accordingly direct the Appellant to submit the requisite information for the non-DPR schemes proposed for capitalization for FY 2008-09 and 2009-10 to the State Commission and the State Commission shall consider the same for capitalization after prudence check. As far as the capitalization for FY 2010-11 is concerned, the Appellant was bound by the directions of the State Commission to club similar non-DPR schemes for approval of the State Commission and restricting non-DPR schemes to 20% of the proposed expenditure for DPR schemes. The State Commission has already agreed to consider the DPR schemes for improvement of performance of the power station as per CPRI recommendations as and

when submitted by the Appellant. As implementation of recommendations of CPRI are required to be implemented expeditiously to bring about improvement in performance of the power stations of the appellant the appellant is directed to submit the DPRs for the same to the State Commission expeditiously and the State Commission shall consider to give approval of the same on priority. This issue is decided accordingly.

11. The fourth issue is regarding Advance Against Depreciation (AAD).

11.1. This issue has already been decided by this Tribunal in judgment dated 27.4.2011 in appeal no. 191 of 2009 in the matter of Maharashtra State Power Generation Co. Ltd. Vs. MERC & Others. The relevant extracts of the Judgment are reproduced

below:

"The Regulation 32.3 clearly indicates that the AAD is permissible in respect of a generating station where the actual amount of loan repayment in a financial year exceeds the amount of allowable depreciation in respect of such generating station, for such financial year".

"12.5. Let us now examine the above contentions of the Respondent no. 1 in seriatim.

i) In the entire tariff exercise the tariff is being determined station-wise. All the components of tariff are determined for each station. The availability at which a generating station recovers its full fixed cost is also determined station-wise. Regulation 32.3 also provides for AAD specific to a generating station. Therefore, it is logical that AAD is also allowed station-wise and not company as a whole. AAD results in front loading of the tariff but the balance depreciation after repayment of loan is appropriately adjusted for AAD so that

the total depreciation allowed to a generating station remains the same. If the Regulations provide for AAD for a generating station, it should not be denied on some other grounds which do not form part of the Regulation.

ii) *The second contention of the Respondent No. 1 is that the State Commission adopted similar approach for AAD in earlier tariff order. In our opinion each tariff proceeding is a separate and distinct cause of action. Failure of the Appellant to challenge an issue in earlier tariff order does not bar the Appellant to challenge that issue in a subsequent tariff order.*

iii) *According to the Appellant same generic loans were taken by the erstwhile Maharashtra State Electricity Board prior to its reorganization which have been allocated station-wise. In our opinion the Appellant's contention of allocating such loans station-wise is the correct approach. The station-wise interest on loan and tariff of the generating stations of the Appellant is also being*

determined on the basis of such allocated loans and specific loans taken for a generating station. Thus actual repayment of such allocated loans can also be apportioned power station-wise.

In view of the above we decide this issue in favour of the Appellant and direct the State Commission to determine station-wise AAD".

Accordingly, this issue is decided in favour of the appellant.

12. The fifth issue is regarding interest expenses and finance charges for FY 2008-09.

12.1. According to the learned counsel for the appellant, the loan drawal and capitalization may not be equal in real terms as part of the loan drawal may be lying under work in progress against advances to suppliers or as an immediate measure internal sources may have been partly utilized by stations to incur an

immediate capital expenditure till the time the loans are approved for the same. Accordingly, the State Commission should have allowed the entire interest charges claimed by the Appellant.

12.2. According to the learned counsel for the State Commission, the Commission has rightly not allowed interest expenses on loans for assets not capitalized during the year. The interest expenses for assets not capitalized are part of capital work in progress and included therein.

12.3. We have noticed that the State Commission has allowed interest on long term loan for Rs. 83.33 Crores as against the claim of Rs. 83.95 Crores by the appellant, disallowing Rs. 0.62 Crores. The financing charges of Rs. 15.96 Crores have been allowed in full. The

findings of the State Commission in this regard is reproduced below:

"Based on the analysis of station wise loan and interest details submitted by MSPGCL, the Commission observed that the loan drawal during FY 2008-09 considered by MSPGCL is less than the capitalization amount for the year for all the stations except in case of Nasik and Parli Stations. Further, MSPGCL has also not shown any equity addition during FY 2008-09. Based on details submitted by MSPGCL, the source of fund for capitalisation figures could not be established and therefore, the Commission has assumed the total capitalization to be funded through debt. Therefore, the Commission has considered new loans with interest rates calculated on the basis of weighted average interest rates of total loans for that station.

For Nasik and Parli stations, the loan drawal during the year exceeded the values of capitalization amount and therefore, for these

Stations, the Commission has disallowed the loan values exceeding the capitalization amount".

We do not find any infirmity in the order. We agree with the State Commission that interest on loan for the works in progress cannot be allowed in the ARR. Accordingly, this issue is decided against the appellant.

13. The sixth issue is regarding consideration of time required for implementation of medium term measures suggested by CPRI for improvement of the performance parameters for FY 2009-10 and 2010-11.

13.1. According to learned counsel for the appellant till the implementation of medium term measures as per the recommendations of the CPRI Plant Availability/Plan Load factor suggested by the appellant may be considered. A reasonable time for

implementation of the medium term measures may be allowed considering the ground realities. Similarly, for Station Heat Rate improvement also reasonable time to implement the medium term measures.

13.2. According to learned counsel for the State Commission, the PLF and availability has been adopted as per the recommendations of the CPRI.

13.3. As far as heat rate is concerned, we have already given our findings in para 8.4 above. As regards Plant Availability/Plant Load factor let us first examine the findings of the State Commission.

> *"The Commission approved the Station-wise Availability in its MYT Order for each year of the Control Period. The Stations for which, MSPGCL projected the availability lower than 80% (i.e., Bhusawal and Parli), the Commission approved the availability of 80%. However, for Uran Gas based station, considering the short supply of gas, in its*

MYT Order, the Commission approved the availability as projected by MSPGCL for recovery of full fixed charges. For the Control Period, the Commission approved the Station-wise PLF considering the PLF projections of MSPGCL, and for stations for which MSPGCL projected PLF lower than 80%, the Commission considered the PLF of 80%, since in times of severe supply shortage, the PLF will be equal to Availability, and full recovery of fixed costs is possible only when the normative availability of 80% is achieved.

The Commission, in its Order dated March 5, 2010 in Case No. 16 of 2008, considered the actual availability and PLF from FY 2005-06 to FY 2007-08 and did not disallow any amount pertaining to Annual Fixed Charges for existing stations on account of lower availability. Further the Commission is the said Order stated that "From FY 2008-09 onwards, the Commission would consider the targets for Unit-wise availability and PLF based on CPRI recommendations". Accordingly, the Commission while approving availability and PLF

for FY 2009-10 and FY 2010-11 has considered the recommendations made by CPRI in its reports as follows:

"Koradi units (1-4) have never exceeded 80 % PLF in their lifetime in spite of de-rating. As per steady trends in Figure 3, the Units the achievable PLFs are around 65 %.

As per the trends Nasik units (1-2) are capable of achieving PLFs of around 75 % after de-rating.

Bhusawal (Unit 1), Paras (Unit 2) and Parli units (1 & 2) are capable of achieving PLF of 80 %.

Units of 210 MW and above can easily achieve the PLF of 80 % with focused attention on coal quality, R & M programs, adherence to planned maintenance schedule, leakage control, operational optimization, etc."

Accordingly, as may be observed from the above recommendations of CPRI, except for some of the Units of generating stations, other Units are capable of achieving 80% Availability and PLF. For Koradi and Nasik Units for which CPRI has recommended lower PLF, the Commission has

considered the recommended values and in order to derive the station wise Availability and PLF, weighted average Availability and PLF has been considered".

13.4. We have noticed that the CPRI has recommended lower PLF for Units 1 to 4 at Koradi and Units 1 & 2 at Nasik. For 210 MW units CPRI felt that 80% PLF could be achieved. The State Commission's findings in this regard are reproduced below:

"Accordingly, as may be observed from the above recommendations of CPRI, except for some of the Units of generating stations, other Units are capable of achieving 80% Availability and PLF. For Koradi and Nasik Units for which CPRI has recommended lower PLF, the Commission has considered the recommended values and in order to derive the station wise Availability and PLF, weighted average Availability and PLF has been considered".

We find that the State Commission has allowed the Availability/PLF more or less at the same level as was allowed for FY 2008-09 as per the recommendations of the CPRI. The recommendations of CPRI for FY 2008-09 are based on the field study. Since the target availability/PLF has been kept more or less at the level of 2008-09, we do not find any infirmity in the findings of the State Commission regarding the plant availability/PLF and, therefore, reject the contentions of the appellant in this regard.

14. The seventh issue is regarding the reduction of annual fixed charges for FY 2008-09.

14.1. According to the learned counsel for the appellant, the report of CPRI was finalized only in December, 2009 and a reasonable time is to be given for implementation of its recommendations. Further

the actual income tax of Rs. 37.53 Cr. and prior period true up should not be linked to annual fixed charges and these should be allowed in full. There are amortizations of the previous year item when pro-rata reduction concept was not applicable.

14.2. According to learned counsel for the State Commission, Annual Fixed charges have been reduced on pro-rata basis for power stations where the Annual Availability was lower than the revised norms fixed by the State Commission on the recommendations of CPRI. Also, the Tariff Regulations do not differentiate the AFC elements for pro-rata reduction of AFC for availability lower than normative level irrespective of whether the AFC element is a pass through or otherwise.

14.3. Regarding annual availability we have already given the findings in paragraph 13.4 above. Accordingly, the Annual Fixed Charges will be reduced for those power stations where the annual availability is less than the normative annual availability according to the Regulations. Now, the question arises if the actual income tax and prior period true up should also be reduced or should be allowed in full.

14.4. According to 2005 Regulations, the Income tax is the component of Annual Fixed Charges. Thus the State Commission has correctly disallowed the Annual fixed charges which included the Income Tax pro-rata on the basis of actual availability. As far as true up amount of the previous years is concerned, the same cannot be included in the Annual Fixed Charges for the FY 2008-09. Accordingly, the true up amount of previous years cannot be included in the AFC for

FY 2008-09 and has to be allowed. This point is, therefore, decided in favour of the appellant.

15. The eighth issue is regarding the interest on working capital for the FY 2008-09.

15.1. According to the learned counsel for the appellant, the impact of the truing up of other parameters as impugned in this appeal ought to be considered for the purpose of working out the true up amount of working capital. The State Commission has not responded on this issue in its reply.

15.2. We agree with the contention of appellant that impact on interest on working capital as a consequence of the implementation of the findings of this Judgment, if any, has to be allowed to the appellant. Accordingly, this issue is decided in favour of the appellant.

16. Summary of our findings

16.1. The first issue is regarding the fuel cost. The decision of the State Commission regarding the fuel cost as per the actuals for the past period has already been upheld by this Tribunal in its judgment dated 27.4.2011 in appeal no. 191 of 2009 in the matter of Maharashtra State Power Generation Co. Ltd. vs. MERC & Others. For 2008-09, the State Commission has correctly taken the Station Heat Rate according to the CPRI recommendations as these were based on the measurements made during 2008/2009 and would reflect the ground reality. For 2009-10 some improvements have been made in the Station Heat Rate norms approved for FY 2008-09 which would reflect the impact of improvements expected due to better operational/management practices.

However, for further improvements in Station Heat Rate a reasonable time schedule may have to be given for implementation of the medium term measures. Accordingly, while we do not interfere with the findings of the State Commission for FY 2008-09 and 2009-10, we direct the State Commission to reconsider the Station Heat Rate for FY 2010-11, taking into account the reasonable time period required for carrying out the medium term measures for improvement of SHR at the various power plants and re-determine the fuel cost for FY 2010-11. We, however, do not find any fault with the methodology used by the State Commission for disallowance of coal cost by proportionately reducing the consumption of imported, domestic, washed and raw coal on pro-rata basis.

16.2. On the second issue regarding O&M expenses, for base year O&M for FY 2006-07 this Tribunal decided the matter in its judgment dated 27.4.2011 in appeal no. 191 of 2009 in the matter between the appellant and the State Commission. For other enhancements in O&M expenses claimed by the appellant due to pay revision, employees benefit, lease rent of office and residential buildings, levy of civil O&M and water Royalty charges etc., we remand the matter to the State Commission for consideration.

16.3. Regarding disapproval of capital expenses, we hold that the order of the State Commission dated 17/18.8.2009 cannot be applied retrospectively to FY 2008-09 and 2009-10. Accordingly, the State Commission is directed to

reconsider the expenditure incurred on the non-DPR schemes for FY 2008-09 and 2009-10 and allow the capital expenditure after prudence check. The appellant is directed to submit the requisite information regarding proposed capitalization of the non-DPR schemes for FY 2008-09 and FY 2009-10 before the State Commission for consideration. Regarding the capitalization for FY 2010-11, the appellant was bound by the directions of the State Commission to club similar non-DPR schemes and convert into DPR schemes. The State Commission has already agreed to consider the DPR schemes for improvement of the performance of the power stations as per CPRI recommendations. The appellant is directed to submit the DPR schemes expeditiously and the

State Commission shall consider the same for approval on priority.

16.4. The fourth issue regarding Advance Against Depreciation has already been decided by this Tribunal in its judgment dated 27.4.2011 in appeal no. 191 of 2009 to determine AAD station-wise. Accordingly, this issue is decided is decided in favour of the appellant.

16.5. The fifth issue is regarding interest expenses. We feel that the State Commission has correctly disallowed the interest expenses on loans for assets not capitalized or works in progress. Accordingly, this issue is decided against the appellant.

16.6. The sixth issue is regarding the time required for implementation of the CPRI

recommendations. We have already summarized our findings regarding Station Heat Rate in paragraph 16.1 above. Regarding Plant Availability/PLF, we do not find any infirmity in the orders of the State Commission and therefore, it is decided against the appellant.

16.7. The seventh issue is regarding the reduction of Annual Fixed Charges for FY 2008-09. We find that the Income Tax is a part of Annual Fixed Charges according to the Regulations and therefore, in case of actual Plant Availability Factor being lower than the normative Plant Availability Factor, the AFC payable including the income tax will reduce proportionately. Regarding the true up amount for previous years, they cannot be included in the AFC for the FY 2008-09 and have to be allowed as pass through.

16.8. The last issue is regarding re-determination of interest on working capital as a consequence of implementation of findings in this judgment. We agree that the impact on interest on working capital as a consequence of findings of this judgment, if any, has to be given effect by the State Commission.

17. In view of above, the appeal is allowed partly and the impugned order is set aside to the extent indicated above, without any cost.

18. Pronounced in the open court on this **4th day of August, 2011.**

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

REPORTABLE / NON-REPORTABLE

vs